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# Prostitution and Pornography: Beyond Formal Equality

Christine Boyle\*  
Sheila Noonan\*

## 1. INTRODUCTION

Both issues that are the subject of this paper raise questions relating to the meaning and application of section 15 of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> They provide case studies of the difficulties in putting an abstract concept, such as equality, into practical legal effect.

The history of the law of prostitution, discussed by Christine Boyle, provides strikingly different images of the legal construction of male and female criminality. An examination of the most recent law on this subject reveals some rejection, at least on the surface, of these images and a commitment to the value of gender-neutrality. The complex subject of pornography, addressed by Sheila Noonan, provides a contrast on a superficial legal level. The law of obscenity never

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\* Of the Faculty of Law, Dalhousie University. We would like to thank Dr. Toni Laidlaw for her helpful comments on a draft of this paper. In addition, Sheila Noonan wishes to thank Colin Sumner for his insightful comments and invaluable support. At an early stage, this paper was presented at a conference entitled *Politics of Pornography: Politics of Prostitution*, sponsored by The Ontario Public Interest Research Group, Toronto, November 1985. The paper was completed prior to the introduction of Bill C-114 (the pornography amendments) during the First Session of the 33rd Parliament.

<sup>1</sup> Sections 1-34 of the *Constitution Act*, 1982 enacted by the *Canada Act*, 1982 (U.K.), c. 11, Sched. B. (hereinafter referred to as the *Charter*).

embodied gender as a distinction and yet still presents obvious equality questions. The possibility of a move away from gender-neutrality as a strategy for achieving equality in this context is worth considering.

What the authors share is a concern about the limitations of formal equality in these contexts. We question whether identical legal treatment for men and women is the best form that equality takes with respect to these issues, feeling that identical treatment is often important but not always sufficient to create equality.<sup>2</sup> Overall, we stress the need for a flexible, contextualised approach to equality, one that is informed by an understanding of the actual problems of inequality.<sup>3</sup>

Furthermore, we share a concern about what are the legitimate and effective limits to the legal action that is consistent both with equality and other things of value. With respect to prostitution, the question is asked whether the criminalization of the behaviour of women can co-exist with a commitment to the equality of women in our society. With respect to pornography, the tension between sexuality and social control is explored. What does equality require with respect to pornography—a little or a lot of law?

Indeed, these areas of concern have more in common than the fact that they present issues relating to the highly-complex nature of equality. Sexuality is a major theme with respect to both. In that prostitution and pornography share this connection, they come very close to what it means to be male and female in our society.

The authors are aware of this and feel that the interaction and tension between sexuality and equality deserves considerable attention.<sup>4</sup> It does not get such attention within the confines of this paper. However, it is an underlying theme throughout. Women as a group have little control over the social meaning or expression of sexuality, although one feminist strategy is to try to achieve at least some influ-

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2 In this we share the concerns expressed, on a theoretical level, by Colleen Shepard, in her paper "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms," and on a practical level, by Susannah Worth Rowley, in "Women, Pensions and Equality."

3 See generally R.A. Samek, "A Case for Social Law Reform" (1977), 55 Can. Bar Rev. 409.

4 It is, in the view of some feminists, central to feminist theory. See C. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982), 7 Signs 515 and "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983), 8 Signs 635.

ence over its meaning. Nevertheless, the lack of control at the present time makes assertions about the autonomy and power of women in the sex trade extremely problematic. What if my sexuality contributes to your oppression? What if my struggle to end oppression interferes with your sexuality? We acknowledge, but do not answer, such questions.

We confine ourselves in this paper to equality in the criminal law with respect to adults.

## 2. PROSTITUTION

A study of the history of the criminal law of prostitution presents a very clear picture of distinctions based on differing perceptions of the roles of women and men.<sup>5</sup> The picture is, to a certain extent, one of separate spheres of deviance and non-deviance,<sup>6</sup> or in other words, one of deviant women and normal men. To the extent that it has been thought appropriate to legislate and then actually use criminal sanctions with respect to prostitution, the law reveals contrasting notions of what it is that women and men *do* for which it is appropriate to punish them.

What follows is not a comprehensive analysis of the law in this area. Rather an attempt is made to highlight aspects of the law that are significant from an equality perspective. It is an area that vividly illustrates the impetus toward gender-neutrality and the deficiencies and dangers of this approach as a notion of equality.

Equality analysis can be brought to bear on a number of different areas:

1. criminal legislation;
2. judicial interpretation and application of such legislation; and
3. enforcement practices.

All three areas of decision-making can legitimately be described as

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5 For a fuller account of the historical background to the present law, see C. Backhouse "Nineteenth Century Canadian Prostitution Law: Reflection of a Discriminatory Society", forthcoming in *Social History/Histoire sociale*.

6 For an excellent discussion of such separate spheres across the spectrum of the criminal law, see E. Schur, *Labeling Women Deviant: Gender, Stigma and Social Control* (New York: Random House, 1984).

forms of government activity or state action.<sup>7</sup> Thus all relevant decision-makers, legislators, judges, prosecutors and police officers, have a *constitutional* duty to respect the standard of equality embodied in the constitution.<sup>8</sup>

The general picture is one of a tendency, on the surface of the law, both legislative and judicial, to move from notions of separate spheres of deviance to gender-neutrality. Not surprisingly, we know least about the history of, and the present situation with respect to, enforcement practices.

### (a) Legislation

One does not need to go very far back in the history of criminal legislation to find some very distinct ideas of separate roles for men and women. As far as women are concerned, the law was both punitive and protective. Until the 1980s, only women could be victimised in the series of ways set out in the procuring offences, found in section 195 of the *Criminal Code*.<sup>9</sup> Living on the avails of the prostitution of another person in section 195(1)(j) was an ostensibly neutral section, but judicial interpretation until recently defined prostitution as a female activity. All the other provisions referred explicitly to "female" persons. For instance, section 195(1) originally stated:

Every one who

...

- (b) inveigles or entices a female person who is not a common prostitute or a person of known immoral character to a common bawdy-house or house of assignation for the purpose of illicit sexual intercourse or prostitution,

is guilty of an indictable offence and is liable to imprisonment for ten years.

This sub-section provides a hint as to the purpose of the procuring offences, which was to protect, as the Fraser Report indicates, "virtu-

7 See generally the paper in this volume by Hester Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology."

8 This is not to suggest that the *Charter* may not have an even broader impact. See Y. de Montigny, "Section 32 and Equality Rights", in *Equality Rights and The Canadian Charter of Rights and Freedoms*, A.F. Bayefsky and M. Eberts eds. (Toronto: Carswell, 1985).

9 R.S.C. 1970, c. C-34 (hereinafter referred to as the *Code*).

ous womanhood".<sup>10</sup> It is noteworthy that the perception was that women needed to be protected from being "inveigled and enticed", as opposed to simply forced, into prostitution. These offences were made gender-neutral several years ago, in the same Act that introduced sexual assault in a gender-neutral form.<sup>11</sup>

It should be added that the procuring section, paternalistically addressed to the protection of women, contained a strong corroboration section. The accused could not be convicted on the evidence of one witness alone, in the absence of corroboration.<sup>12</sup> This corroboration provision appeared in the one section that clearly addressed the victimisation of women.

The punitive aspect can be found in a provision that survived until relatively recently—the "Vag. C." offence. Section 175(1) of the *Code* used to state:

Every one commits vagrancy who

...

(c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself.

This was repealed in 1972 and replaced by the even more recently repealed soliciting offence in section 195.1,<sup>13</sup> partly because of the discrimination inherent in it.<sup>14</sup> The new offence was gender-neutral on its face, in that it stated that "[e]very person who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction." Judicial interpretation, discussed later, cast doubt on its application to men.

So, until recently, the *Code* reflected the view that women were prostitutes or in danger of being "inveigled" into prostitution. There

10 Can. *Pornography and Prostitution in Canada* (Ottawa: Ministry of Supply and Services, 1985), p. 403—*Fraser Report*.

11 *Criminal Law Amendment Act*, S.C. 1980-81-82, c. 125, s. 13.

12 *Code*, s. 195(3). An exception relates to s. 195(1)(j)—living on the avails. This provision was added in 1913 (3 & 4 Geo. V (1913), c. 13, s. 9 (Canada). Why was it possible to convict an accused on the word of a prostitute but not on that of a "virtuous" woman?

13 *Criminal Code Amendment Act*, S.C. 1972, c. 13, ss. 12, 15.

14 See generally, *Report of the Royal Commission on the Status of Women* (Information Canada, 1970) and the comment by L. Smith on whether the "Vag. C" offence discriminated against women: (1971), 6 U.B.C. Law Rev. 442.

was not an explicit form of deviance exclusive to men—indeed the most notable thing was the fact that customers were, to a great extent, not labelled as deviant at all. However, section 195(2)—living on the avails—contained a strong hint that pimps were perceived as male, in the legislative imagination. It stated:

Evidence that a male person lives with or is habitually in the company of prostitutes, or lives in a common bawdy-house or house of assignation is, in the absence of evidence to the contrary, proof that he lives on the avails of prostitution.

The assumption that men were likely to be exploitative of women, while women in the same situation would not be, was very clear.

Again, this section has been made gender-neutral, in the sense that the word “male” has been taken out, not that the pronoun has changed.<sup>15</sup> This change forms part of a dramatic pattern of movement from sex-specific to gender-neutral provisions in this area. It seems safe to conclude that there is an established legislative policy with respect to prostitution.<sup>16</sup> This view is reinforced by the passage of the draconian new soliciting provisions. These are both gender-neutral in the narrow sense that they apply to both male and female prostitutes, but also in the broader sense that they make it explicit that customers may engage in criminal behaviour.

The new section 195.1(1) states as follows:

Every person who in a public place or in any place open to public view

(a) stops or attempts to stop any motor vehicle,

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.<sup>17</sup>

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<sup>15</sup> *Criminal Law Amendment Act*, S.C. 1980–81–82, c. 125, s. 13.

<sup>16</sup> One cannot generalize further. The woman-specific criminalization of abortion in s. 251(2) has not yet been removed. It will be interesting to see whether the government policy is one of male-specific gender-neutrality, *i.e.*, only offences that “discriminate” against men are changed.

<sup>17</sup> *Criminal Code*, R.S.C. 1970, C-34, as am. by S.C. 1984–85 (1st Session), c. 50, s. 1.

The last fourteen years, therefore, have seen a legislative programme of complete adoption of gender-neutrality as a guiding principle in the formulation of prostitution offences.

1972        The woman-specific "Vag. C" offence was removed and replaced by an apparently neutral soliciting offence.

1980-81

-82        The procuring offences were made gender-neutral.

The presumption with respect to living on the avails was made gender-neutral.

The following gender-neutral definition of prostitution was added<sup>18</sup>—"prostitute" means a person of either sex who engages in prostitution.<sup>19</sup>

1984-85    Sweeping provisions clearly applying to customers and male prostitutes were added.

The new offences join the other reformed offences as well as those which were always expressed in gender-neutral terms, such as keeping a common bawdy-house<sup>20</sup> and related offences such as causing a disturbance.<sup>21</sup>

In summary, what evidence there is suggests that there were the following images in the legislative mind:

1. prostitutes were women and deviant;
2. if women were not prostitutes, they were in need of protection from exploitative males;
3. males were consumers of prostitution and non-deviant; or

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18 *Criminal Law Amendment Act*, S.C. 1980-81-82, c. 124, s. 11.

19 *Code*, s. 179(1).

20 *Code*, s. 193.

21 There are a number of offences that, while not related to prostitution *per se*, could be used with respect to some of its public manifestations: gross indecency, s.157; indecent acts, s. 169; nudity, s. 170; causing a disturbance, s. 171; trespassing at night, s. 173; common nuisance, s. 176. All of these offences are drafted in a gender-neutral way and do not reveal any conceptions about different male and female ways of being disorderly or publicly immoral. No assumptions are being made about enforcement decisions.



4. exploiters of women;
5. women as well as men could exercise an administrative role in the commercialisation of prostitution, e.g., in keeping a bawdy-house;
6. there were no distinctly male and female ways of being disorderly or publicly immoral.

However, for some years now, there has been a concerted legislative effort to eradicate any suggestion of separate spheres of deviance from the *Code*.

Before moving on to the judicial views on this issue, one last point should be made about behaviour proscribed by the *Code*. There are significant silences as well as utterances. While there are certain carefully-circumscribed sexual offences relating to vulnerable women and girls,<sup>22</sup> there is no general crime of exploiting economic need in order to engage in sexual activity. An analogy can be drawn to the concept of the exercise of authority in section 244(3)(d) with respect to sexual assault. It is a crime to use one's authority to secure sexual submission but not to exploit one's economic advantages. This omission is significant in that the area of sexual assault has been recently reformed,<sup>23</sup> at a time when the very serious problem of the poverty of women was well-known.

Another silence is noteworthy. From a perusal of the *Code*, one would not suppose that there was any particular social problem of police harassment of prostitutes. This suggests the unsurprising point that prostitutes do not have a voice in the labelling of deviance. This article is not about that process, although it would be interesting to know whose ideas *were* influential. The point is one that will be addressed later, namely, that equality may have more to do with what is labelled as deviant, rather than the manner of expressing the prohibition. It is vital that equality analysis be of a type that permits broad comparisons, ranging over the whole of the criminal law, as opposed to technical points about the content of particular crimes.<sup>24</sup>

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22 E.g., intercourse with a young female employee, s. 153(1)(b); parent or guardian procuring defilement, s. 166; seduction of a female passenger on a vessel, s. 154.

23 See generally Boyle, *Sexual Assault* (Toronto: Carswell, 1984).

24 Thus it should be possible to compare the criminalization, for instance, of contempt of court with the legality of incitement to sexual hatred. Suggesting that a judge is sexist may be punished as contempt, while the statements leading to the accusation do not come within the scope of any existing crime.

## (b) Judging

The judicial record has, in the past, not been one of concern about possible discrimination in gender-specific offences. Canadian judges were willing to accept legislative decisions to punish women for conduct that was non-criminal for males. Challenges to such offences on the basis that they offended the *Bill of Rights*<sup>25</sup> equality provision were therefore unsuccessful.

*R. v. Beaulne; Ex Parte Latreille*<sup>26</sup> provides one example. The old "Vag. C" offence was challenged as discriminating on the basis of sex. It proscribed the status of being a common prostitute or night walker, found in a public place and unable to give a good account of herself. Houlden J., of the Ontario High Court, found that it did not discriminate against women, albeit that it only applied to women:

It is not all females who being found in a public place must give a good account of themselves, but only females falling within the class of "prostitutes and night walkers".<sup>27</sup>

It is hardly surprising to find that the old gender-specific laws were not struck down by judges. The judiciary did a great deal to nurture the idea that *prostitutes were women* and their customers were male.<sup>28</sup> Women were the providers of sex and men the consumers. This not only reveals a great deal about gender roles in the judicial mind but also exposes the notion of prostitution as a heterosexual activity.<sup>29</sup> Laws that simply reflected reality, as perceived by the

25 R.S.C. 1970, Appendix III.

26 [1971] 1 O.R. 630, 13 C.R.N.S. 98 (*sub nom. R. v. Latreille*), 2 C.C.C. (2d) 196, 13 Cr. L.Q. 219, 16 D.L.R. (3d) 657 (Ont. H.C.).

27 [1971] 1 O.R. at 632. While the term "night walker" seems merely an archaic term for prostitute, it is interesting that it was literally stated that a woman walking at night was suspicious and could be required by the police to explain herself. Houlden J., did not find this treatment, a potential for all women, discriminatory. *R. v. Lavoie*, [1971] 1 W.W.R. 690, 2 C.C.C. (2d) 185, 16 D.L.R. (3d) 647 (B.C. Co. Ct.) also upheld the "Vag. C" offence.

28 See *R. v. Knowles*, *infra*, note 36. See also *R. v. Cardell* (1914), 7 Alta. L.R. 404, 23 C.C.C. 271, 19 D.L.R. 411 (Alta. C.A.): "The word 'prostitute' in the section evidently means promiscuous sexual intercourse with men."

29 "[W]hat the law intended to repress, according to my opinion, is the keeping of establishments destined to encourage immoral relations, between men and women." *Dubé v. R.*, [1948] R.L. 525, 94 C.C.C. 164 (Que. C.A.), p. 171 (C.C.C.), *per Pratte J.* If one wanted a concept to cover homosexual behaviour one had to move to indecency. Thus the definition of "common bawdy-house" is a place used "for the purpose of prostitution or the practice of acts of indecency." *Code*, s. 179(1).

judiciary, were therefore inoffensive and, in a sense, inevitable.

The judicial correlation of prostitutes and women was quite consistent. Even recent examples are easy to find.

The Ontario Court of Appeal defined prostitution in terms of women in *R. v. Lantay*.<sup>30</sup> The court utilized two English decisions in which prostitution was described exclusively as an activity engaged in by women. In *R. v. De Munck*,<sup>31</sup> it was stated that "prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in return."<sup>32</sup> Similarly, in *R. v. Webb*<sup>33</sup> reference was made to the situation "where a woman offers herself as a participant in physical acts of indecency for the sexual gratification of men."<sup>34</sup> The differing gender roles could not be made more explicit.

In *R. v. Patterson*<sup>35</sup> an Ontario County Court judge went so far as to interpret "every person" in section 195.1 to refer to women only. Thus he refused to convict a prostitute, who was male, of soliciting.<sup>36</sup>

Spence J., in the famous *Hutt*<sup>37</sup> case, stated:

I suppose that in Vancouver there are hundreds of pedestrians every day who request free rides in automobiles, and it would appear ridiculous and abhorrent to say that everyone of them *who was female* and who did so was guilty of soliciting within the provisions of [s. 195.1].<sup>38</sup>

There were a number of obvious factors influencing this type of thinking. First, for a long time the legislative structure assigned two basic roles to women: either prostitute or woman in need of protection from exploitative males. Second, dictionary definitions displayed the

30 [1966] 1 O.R. 503, [1966] 3 C.C.C. 270, 47 C.R. 72 (Ont. C.A.).

31 [1918] 1 K.B. 635 (C.C.A.).

32 *Ibid.*, p. 637.

33 [1963] 3 All E.R. 177, [1964] 1 Q.B. 357 [1963] 3 W.L.R. 638 (C.C.A.).

34 *Ibid.*, p. 643 (W.L.R.), p. 180 (All E.R.).

35 (1972), 19 C.R.N.S. 289 (Ont. Co. Ct.).

36 *Cf. R. v. Obey* (1973) 21 C.R.N.S. 121 (B.C.S.C.) and *R. v. Gallant* (1974), 17 C.C.C. (2d) 555 (B.C. Cty. Ct.). The judicial application of gender-neutral words to women only has some precedent in *R. v. Knowles* (1913), 12 D.L.R. 639 (Alta.), in which it was held that a man could not be convicted of being an inmate of a common bawdy-house. The concern was that if a man could be convicted then a mere [male] servant could be. It was stated at p. 640, in quashing the conviction, that "the meaning to be attached to the word inmate is an inmate for the purposes of prostitution and therefore a female."

37 *Hutt v. R.*, [1978] 2 S.C.R. 476, 1 C.R. (3d) 164, 2 W.W.R. 247, 19 N.R. 330, 38 C.C.C. (2d) 418, 82 D.L.R. (3d) 95.

38 *Ibid.*, p. 169 (C.R.), p. 481 (S.C.C.). *Italics added.*

same tendency. For instance, in *R. v. Patterson*<sup>39</sup> reliance was placed on various dictionary definitions that referred to prostitutes as women, as well as on the usage of the expression "male prostitute". English case law also reinforced this inclination.<sup>40</sup>

The negative aspect for women of course lay in the legal and social meaning of prostitution. As noted in the *Fraser Report*, in its outline of the history of the prostitution laws, "with the partial exception of bawdy-house provisions, the emphasis of the law was on penalising the prostitute."<sup>41</sup>

Even when the legislative emphasis changed, to some extent, with the repeal of the woman-specific vagrancy law and the enactment of the apparently neutral soliciting law,<sup>42</sup> there was some judicial resistance to punishing the customer. In *R. v. Dudak*,<sup>43</sup> it was held that a customer could not be guilty of soliciting for the purpose of prostitution.

As far as I know there does not exist a problem of groups of potential customers soliciting and accosting people in public places while looking for prostitutes. It seems to me that if Parliament had intended to bring about such a radical departure from previous laws on the subject of soliciting . . . it could have done so quite simply, concisely and explicitly.<sup>44</sup>

It would indeed have been a departure from the previous laws on prostitution *per se*. The only way a customer could have been punished was if he were convicted of being found in a common bawdy-house under section 193(2)(b). I could find one reported case on this sub-

39 *Supra*, note 35.

40 See the text accompanying notes 30-34.

41 *Supra*, note 10 at p. 403.

42 *Criminal Code Amendment Act*, S.C. 1972, c. 13, ss. 12, 15. See the text following note 14, for the wording.

43 [1978] 1 W.W.R. 217, 3 C.R. (3d) 68 at 69, 38 C.C.C. (2d) 172 (B.C. Co. Ct.).

44 *Ibid.*, p. 175 (C.C.C.). Cf. *R. v. Di Paola* (1978), 4 C.R. (3d) 121, 43 C.C.C. (2d) 199 (Ont. C.A.). There has been a similar reluctance to punish heterosexual customers in England. There, s. 1(i)(b) of the *Vagrancy Act, 1898* (U.K.), c. C-39 made it an offence for a male to solicit persistently or importune for immoral purposes. This was interpreted in *Crook v. Edmondson*, [1966] 1 All E.R. 833, [1966] 2 Q.B. 81 (D.C.), as not applying to soliciting women prostitutes, but only to inviting homosexual intimacies, and to "touting" on behalf of a female prostitute. The Ontario Court of Appeal rejected this as unhelpful in *Di Paola*. For a comment on the double standard involved in not punishing the customer, see E.G. Ewaschuk, "Trick or Treat?: The Offence of Soliciting" (1980), 12 *Ottawa L.R.* 235.

section and it involved a decision that a keeper of a common bawdy-house could not also be convicted as a found-in.<sup>45</sup> There are no digests in *The Canadian Abridgment*. However, the refusal to label the customer as deviant is obviously to be traced more to legislative and enforcement practices rather than the judiciary.

What other judicial images of men and women can be identified? Both could be convicted of keeping a common bawdy-house. The "keeper" did not assume an exclusively male or female shape in the judicial imagination.<sup>46</sup>

On the positive side, a woman was less likely to exploit another woman than a man was. In *R. v. Odgers*<sup>47</sup> there was a constitutional challenge to section 195(2). At that time it contained a presumption that a man was living on the avails of prostitution if he lived with or was habitually in the company of prostitutes. There was no equivalent presumption for women, and thus the section was attacked as discriminatory. The judgment contains an explicit assertion that it is reasonable to assume a man is exploiting a female.

The offence here is a sex-oriented one. It may well be a reasonable inference that a male who lives with or is habitually in the company of prostitutes lives on the avails of prostitution. A similar inference could not reasonably be drawn in the case of a female person . . . .<sup>48</sup>

The courts supplemented the legislative corroboration requirements by expressing a distrust of the evidence of prostitutes, who were, of course, women. *R. v. Williams*<sup>49</sup> suggested that the evidence of prostitutes be subjected to the most careful scrutiny.

Nevertheless, even the judiciary cannot resist the trend toward gender-neutrality. There are beginning to be hints that prostitutes can belong to either sex. Purvis J., of the Ontario Provincial Court, stated as long ago as 1977, with respect to soliciting, that

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45 *Labelle v. R.*, [1957] Que. Q.B. 81 (C.A.).

46 *R. v. Warren* (1888), 16 O.R. 590 (Q.B.). The Court stressed, in convicting a husband and wife, that management and not property was in issue. (A property orientation would have, of course, confined the deviance label, almost exclusively, to men.) It was speculated at p. 592 that the wife "may probably have as great, maybe a greater share than the husband in the criminal management of the house."

47 [1978] 1 W.W.R. 312, 7 A.R. 192, 37 C.C.C. (2d) 554 (Alta. C.A.).

48 *Ibid.*, p. 557 (C.C.C.), per McGillivray J., for the Court.

49 [1935] 2 W.W.R. 640, 63 C.C.C. 360, [1935] 2 D.L.R. 696 (B.C. Co. Ct.).

there must be an importuning, a propositioning, a pestering, of one individual, in an attempt by a female, or a male *I suppose*, to offer services to that individual.<sup>50</sup>

Reported cases are very rare indeed, but both *R. v. Obey*<sup>51</sup> and *R. v. Gallant*<sup>52</sup> held that a male could be found guilty of soliciting for the purposes of prostitution.

Challenges to the sex-specific elements in prostitution legislation have of course been anticipated by Parliament. Thus, we will not know whether the old law would have been upheld as reflecting some natural division and therefore constitutionally inoffensive. The matter does not end there, however, as judges may well have to take a stand on the question of discriminatory enforcement of neutral laws. Judges themselves have a constitutional obligation to respect the *Charter*, so that some of them may resist being implicated in inequality of enforcement should it become possible in the future to establish it to their satisfaction.

There is no reason for optimism that the judiciary will act energetically to protect itself from becoming a passive tool in the hands of discriminatory enforcement agencies. Further, we do not yet know whether judges would even be willing to consider as constitutionally suspect unequal administration of laws as opposed to inequality on their face.<sup>53</sup> Still further, there is no consistent pattern yet with

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50 *R. v. Tyo* (1977), 36 C.C.C. (2d) 479 at 480 (Ont. Prov. Ct.). Italics added.

51 [1973] 3 W.W.R. 382, 21 C.R.N.S. 121, 11 C.C.C. (2d) 28 (B.C.S.C.).

52 (1974), 17 C.C.C. (2d) 555 (B.C. Co. Ct.).

53 In an early *Morgentaler* case, Mr. Justice Laskin refused to review the abortion provisions on the ground that they were administered unequally. This was a reach for equality by judicially unmanageable standards. He stated that he did not regard the *Bill of Rights* as "charging the courts with supervising the administrative efficiency of legislation or with evaluating the regional or national organisation of its administration, in the absence of any touchstone in the legislation itself." [1976] 1 S.C.R. 616 at 635. This was quoted and adopted by Parker J., in *R. v. Morgentaler* (1984), 47 O.R. (2d) 353 at 392. It is of course possible that s. 15 will be given a broader interpretation in view of the much more extensive wording. However, the Ontario Court of Appeal, in the most recent *Morgentaler* case, quoted Laskin C.J.C.'s words with approval, stating that "it is for Parliament to deal with any unevenness or disparity in the administration of the relieving provisions of the section:" (1985), 48 C.R. (3d) 1 at 49. In his annotation to the case, Professor Stuart says that this "bald proposition cannot be right." He points to other areas where the courts are clearly concerned with the constitutional administration of the law, for instance, with respect to the right to be tried within a reasonable time: *id.* at p. 6. It would weaken s. 15 considerably if the courts refused to review the constitutionality of administrative decisions. However, it

respect to the judicial view of inequality even on the face of legislation. Hence, predictions about more subtle forms of discrimination are very premature. Assuming that judges become willing to review the administration of neutral laws, the way they conceptualize equality will be very significant. What do existing cases tell us about how Canadian judges understand equality? The cases on gender-specific offences provide some clues. If judges do not find crimes that can only be committed by members of one sex constitutionally offensive, then they are very unlikely to be concerned about enforcement against one sex. The cases seem to fall into three camps so far.

First, there is a strong thread of the "legislation can reflect natural differences" approach.<sup>54</sup> This can be illustrated in its clearest form by two recent decisions of the Manitoba Court of Appeal.

*Re Marzan and R.*<sup>55</sup> involved an unsuccessful argument based on the fact that there was a different (and higher) maximum penalty for indecent assault by a male on another male as compared to indecent assault on a female.

[A]ccording to the age-old traditions of Judaeo-Christian morality, the types of indecent assault are quite different. . . . The distinction drawn by the *Code* is not as to persons but as to type of activities.<sup>56</sup>

*R. v. McIntosh*<sup>57</sup> dealt with a challenge to section 153; that is, illicit intercourse between a man and his foster daughter. It was unanimously held that this section does not discriminate on the basis of sex—the fact that only a female can be a complainant was held to be due to the type of conduct involved.

What he [counsel for the accused] seems to have entirely forgotten is that the distinction—or the inequality or the discrimination as he may call it—does not arise from an Act of Parliament but from an act of Mother Nature. In that respect Parliament cannot be taxed of an unfair or unequal Act since the sexes by nature are different. . . . Counsel for the accused in his vain attempt to force equality has mixed apples and oranges and cannot be successful.<sup>58</sup>

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should be noted that the Ontario Court of Appeal suggested that in individual cases "the established inequality or discriminatory treatment could be such as to render the section inoperative in those cases:" *id.* at p. 50.

54 Hence, one assumes, administration could reflect natural differences.

55 (1981), 64 C.C.C. (2d) 479, 14 Man. R. (2d) 143, 131 D.L.R. (3d) 370 (Man. C.A.). Leave to appeal to the S.C.C. refused 64 C.C.C. (2d) 479 (S.C.C.).

56 *Ibid.*, p. 480 (C.C.C.), per O'Sullivan J.A. for the Court.

57 [1984] 4 W.W.R. 734, 28 Man. R. (2d) 81 (Man. C.A.).

58 *Ibid.*, 741–742 (W.W.R.), per Monnin C.J.M.

It is this type of natural differences reasoning which may be used to justify the upholding of the woman-specific abortion offence in section 251(2) of the *Code*. In effect, it has been so upheld already in *R. v. Morgentaler*.<sup>59</sup> The Ontario Court of Appeal, in rejecting the argument that section 251 discriminated on the basis of sex, adopted the statement that any "inequality between the sexes in this area is not created by legislation but by nature."<sup>60</sup> There is nothing inherent in this approach that makes it advantageous to women. The difference in question in any case could be turned into a disadvantage or an advantage, or could possibly be both.

A second tendency is to strike out all distinctions as being constitutionally offensive. The cases in this group seem typically to involve arguments that legislation discriminates against men. For example, in *R. v. Lucas*,<sup>61</sup> statutory rape was declared unconstitutional. In *Shewchuk v. Ricard*,<sup>62</sup> the *Child Paternity and Support Act* was struck down at first instance, as being discriminatory against men.<sup>63</sup>

A third class of cases includes those in which certain distinctions are found to be justified, by something other than nature.<sup>64</sup> The action of the British Columbia Supreme Court in overturning the first instance decision in *Shewchuk v. Ricard*<sup>65</sup> is an illustration. So is the first instance decision in *Blainey v. Ont. Hockey Assn.*<sup>66</sup> The exclusion by the Association of females from membership in hockey clubs was

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59 (1985), 48 C.R. (3d) 1, 52 O.R. (2d) 353, 11 O.A.C. 81, 22 C.C.C. (3d) 353, 22 D.L.R. (4th) 641, 17 C.R.R. 223 (Ont. C.A.).

60 *Ibid.*, 50 (C.R.) quoting Ritchie J., in *Bliss v. A.G. Can.*, [1979] 1 S.C.R. 183 at 190. It is interesting that the Court chose to quote from one of the most notorious cases in Canadian equality jurisprudence.

61 (1985), 16 C.R.R. 1, 6 C.H.R.R. D/3002 (Ont. Dist. Ct.), reversed (1986), 14 O.A.C. 124 (*sub nom. R. v. Lucas; R. v. Neely*) (Ont. C.A.). See also *R. v. Neely* (1985), 22 C.C.C. (3d) 73 (Ont. Dist. Ct.) and *R. v. D.I.L.* (1985), 46 C.R. (3d) 172 (Ont. Dist. Ct.). In the latter case, Kent D.C.J. stated, orally, at p. 178, that "the proper course for the Parliament of Canada would be to continue the trend started with the sexual assault amendments to the Code. . . ."

62 [1985] 6 W.W.R. 427, 17 C.R.R. 117 (B.C. Prov. Ct.).

63 The appeal to the B.C.S.C. was successful: [1985] 6 W.W.R. 436, 66 B.C.L.R. 107.

64 This may not be a separate category at all. The "no distinctions" cases could be seen as decisions that no satisfactory justification had been offered.

65 *Supra*, note 63.

66 (1985), 52 O.R. (2d) 255, 6 C.H.R.R. D/3016, 21 D.L.R. (4th) 599 (Ont. H.C.), reversed (1986), 54 O.R. (2d) 5133, 14 F.O.A.C. 194, 26 D.L.R. (4th) 728 (Ont. C.A.), with the denial that distinctions could be justified.



found to promote a significant state interest. Thus the exclusion was justified under section 1 of the *Charter*.

The *most* that can be said at the moment, bearing in mind the slight trend in the context of prostitution and the differing judicial approaches to equality, is that there may be a growing understanding that gender is a suspect proxy for some other functional classification. These small roots would need to flower into a sophisticated analysis of equality and be combined with a willingness to scrutinize administrative enforcement decisions before one could be certain that judges will assume the responsibility of ensuring that gender-neutral legislation is not applied in a discriminatory way. It is important, however, that judges undertake such a responsibility in order to protect the constitutional integrity of their process.

### (c) Enforcement

Is it reasonable to assume that we may have a problem of discrimination on the part of the people responsible for the enforcement of the law? While not a criminal matter, a recent Nova Scotian case is revealing.<sup>67</sup> The Attorney-General sought an injunction against a number of Halifax women alleged to be prostitutes. The argument was that the public manifestations of prostitution constituted a common nuisance, which the Court had the power to enjoin. While it was clear that people of both sexes contributed to the alleged nuisance, the proceedings were taken against women only, notice being given by posting the names of women on lamp-posts in the city. Section 15 was not then in force, and it seemed to have no effect in making law enforcement officials consider the offensiveness of isolating a number of people on the basis of their sex and proceeding against them with respect to a social problem to which both sexes contributed.<sup>68</sup> The action was unsuccessful but not because this process was inconsistent with any concept of sexual equality or because the Court objected to an unconstitutional abuse of its process.

Enforcement receives some attention in the *Fraser Report*. The figures reveal that charges with respect to bawdy-house offences have

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67 *A.G. N.S. v. Beaver* (1985), 67 N.S.R. (2d) 281, 49 C.P.C. 295, 32 C.C.L.T. 170, 18 D.L.R. (4th) 286 (N.S.C.A.).

68 Of course, s. 28 was then in force. Clearly law enforcement officials, in the exercise of their own independent responsibility to respect the constitution, did not feel that this section prevented them from proceeding against women only.

been declining steadily although not uniformly across the country.<sup>69</sup> The procuring offences, with their historical theme of the protection of women, are not utilized to any great extent.<sup>70</sup> The prosecutions for soliciting and pimping have dropped dramatically in recent years,<sup>71</sup> and the discontent of police forces has tended to focus on the need for a strengthening of their powers in this context.<sup>72</sup>

The *Fraser Report*, however, does not contain any analysis of enforcement patterns with respect to the sex of the persons victimised, charged or convicted. While such a breakdown is available with respect to persons charged, it is not very illuminating. With respect to bawdy-house offences, the picture varies. For instance, in 1981, 681 males were charged compared to 471 females.<sup>73</sup> In 1984, charges were brought against 336 males and 507 females.<sup>74</sup> Procuring (aside from pimping) seems predominately a male offence according to the charges brought.<sup>75</sup>

Unfortunately, pimping (stereotypically male) and soliciting (stereotypically female) are lumped together under the heading, "Other Prostitution Offences," so one can discover nothing from the statistics<sup>76</sup> about the pimp/prostitute/customer gender breakdown. It

69 The *Fraser Report*, at p. 410. There were 1,143 prosecutions in 1975, compared to 269 charges reported in 1982. I found 391 in *Canadian Crime Statistics* (Statistics Canada, 1982).

70 The *Fraser Report*, at p. 416. The numbers fluctuated between 100 and 200 from 1974-1982.

71 *Ibid.*, pp. 421-426.

72 See generally, *ibid.*, Ch. 27.

73 *Canadian Crime Statistics* (Statistics Canada, 1981).

74 *Canadian Crime Statistics* (Statistics Canada, 1984).

75 *Canadian Crime Statistics* (Statistics Canada, 1981-84).

	Males	Females
1981	32	3
1982	76	34
1983	72	31
1984	88	22

76 *Ibid.*

	Males	Females
1981	270	377
1982	56	127
1983	59	70
1984	37	18

is clear only that very few charges are brought. Charges in relation to indecent acts and public morals are mostly brought against males.<sup>77</sup>

The statistics for reported and unfounded offences are not broken down by gender. At the very least, such figures would be necessary to enable us to develop a clearer picture with respect to police strategies and whether they are indeed influenced by gender.

Common sense would indicate that in this context, enforcement patterns are more likely to reflect the gender of the police officers assigned to collect the necessary evidence. What little research there has been shows a reluctance to utilize prostitution laws against customers.<sup>78</sup>

Even if we knew more about enforcement practices, it would still be necessary to analyse the data using a coherent notion of equality. Many equality theorists have stressed the need to focus on results rather than the formulation of rules in themselves. This is helpful in that we would not have achieved much if we had gender-neutral prostitution law enforced against women only. However, the equality goal can hardly be one of equal numbers of male and female persons prosecuted. Enforcement figures ought to reflect the gender of persons actually engaging in the deviant behaviour.

Gender imbalance would not be troublesome if one could be confident of two things. First, it is important that the *definition* of what is deviant not reflect a male perspective. Second, given an equal labelling process, we need some way of distinguishing between discriminatory enforcement distorting the definition and producing different numbers of male and female accused persons, and a non-discriminatory pattern that simply happened to produce such differences.

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77 See, e.g., *Canadian Crime Statistics* (Statistics Canada 1984).

	Males	Females
Indecent Acts	2,587	254
Public Morals	386	89
(ss. 159, 162-168)		

78 See P.A. Roby, "Politics and Prostitution: A Case Study of the Revision, Enforcement, and Administration of the New York State Penal Laws on Prostitution" (1971-72), 9 *Criminology* 425. This study showed that there was enough political pressure to include "patronizing", but the law was rarely used. Since the new soliciting law came into force, a number of alleged customers have been prosecuted in Nova Scotia. It will be some time before it will be possible to study patterns of police and prosecutorial behaviour.

Such a test of equality in enforcement of the law is now crucial. The trend toward gender-neutrality in legislating and judging is likely to drive whatever discrimination there is underground into enforcement decisions. Thus, a test of what is equal enforcement will be necessary in order to challenge the constitutionality of the criminal law in practice.

Does American jurisprudence provide a test of unequal enforcement? The basic approach seems to be one of deference to prosecutorial discretion. Thus, the exercise of some selectivity in the application of a criminal statute is not *per se*, a denial of equal protection.<sup>79</sup> In this particular context, it has been held that there may be valid reasons for prosecuting a prostitute and not a customer.<sup>80</sup> However, equal protection may be violated by intentional discriminatory enforcement and application.<sup>81</sup> This is very difficult to establish. Some lower courts have been satisfied that neutral prostitution laws have been applied in a discriminatory fashion, but such findings rarely survive appeal.<sup>82</sup>

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79 See cases cited in *Corpus Juris Secundum*, Vol. 16B, p. 603.

80 *State v. Johnson* (1976), 246 N.W. (2d) 5003 (Wis.); *People v. Garner* (1977), 72 C.A. 3d 214 (Cal App.) held that if there is a difference in the kind of conduct, there is no denial of equality, even though the conduct is of equal culpability. For a general discussion of U.S. equality challenges, see C. Rosenbleet and B.J. Pariente, "The Prostitution of the Criminal Law" (1973), 11 Am. Crim. Law Rev. 373. Such attacks are "extricably entwined with the reality that no matter how neutrally the statutes are worded, prostitution is traditionally a sex-defined crime, applicable to only one sex or used in practice against one sex:" *id.*, at p. 381.

81 See cases cited in *Corpus Juris Secundum*, Vol. 16B, at p. 606-607. The early case of *Yick Wo v. Hopkins* (1886), 118 U.S. 356 held that discriminatory enforcement of the law could be attacked.

82 See e.g., *Morgan v. City of Detroit* (1975), 389 F. Supp. 922 (E.D. Mich); *United States v. Moses* (1975), 339 A. 2d 46 (D.C.); *United States v. Wilson* (1975), 342 A. 2d 27 (D.C.); *People v. Sup. Ct.* (1977), 138 Cal. Rptr. 66. It is hardly surprising that enforcement patterns are very difficult to challenge in the U.S. Courts have upheld prostitution statutes that, on their face, apply only to women, deferring to the legislative judgment on this matter. Thus, in *Sumpter v. State* (1974), 306 N.E. 2d 95 (Ind.), appeal dismissed 419 U.S. 811, appeal after remand 340 N.E. 2d, 764, cert. denied 425 U.S. 952, it was held that the punishment of women only did not violate the right to equal protection. See also *State v. Devall* (1974), 302 So. 2d 909 (La.). "Neutral" statutes applying to prostitutes but not customers have also been upheld: *Blake v. State* (1975), 344 A. 2d 260 (Del. Super Ct.). See also *U.S. v. Moses* and *U.S. v. Wilson*, *supra*. There are some cases displaying sensitivity to the discrimination inherent in isolating women. For an early example, see *People v. Edwards* (1920), 180 N.Y.S. 631, at 634-35 (N.Y. Cty. Ct.). "The men create the market, and the women who supply the demand pay the penalty. It is time that this unfair discrimination and injustice should cease." See also *Plas*

If intention is rejected as a test in Canada, a replacement test of discriminatory enforcement will be necessary. Obviously, police have a great deal of discretion, which can be properly exercised on grounds other than gender. It might be enough simply to inquire if gender were a factor, whether consciously or unconsciously.

Two points can be made, however, about the search for a test other than intention. First, the obvious practical and theoretical difficulties in developing a workable test demonstrate how justifiable it is to feel concern about the move toward gender-neutrality. A facially-neutral law may simply move the reality of unequal treatment to an area where it becomes relatively invisible, and thus less challengeable than before. Second, the question must be asked whether the drive toward gender-neutrality in enforcement, as a logical extension of gender-neutrality in definitions, is, in fact, misconceived as a goal. It might even be dysfunctional in this context.

Thus the following section addresses the question of whether there is a better approach to equality in the criminal law on prostitution.

#### **(d) Beyond Formal Equality**

In order to highlight the problem of the meaning of equality with respect to prostitution law, it may be helpful to ask the following question. Would we have achieved equality if we had gender-neutral prostitution law even-handedly enforced against both sexes? We might have eradicated the double standard, which was clearly unequal, but is the absence of it equality?

Gender-neutrality, as an abstraction, takes on a different significance depending on its context. It may sometimes be positive for women, sometimes negative and sometimes unimportant either way. It seems relatively insignificant to couch largely unenforced protective laws in gender-neutral terms. It seems at least a positive step to eradicate the double standard with respect to soliciting. However, the very concept that leads to that reform would prevent customers alone being labelled as deviant.<sup>83</sup> This clearly emerges in the discussion above on

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v. *State* (1979), 598 P. 2d 966 (Alaska), in which a clause of a prostitution statute prohibiting certain conduct "by a female" was found invalid, *City of Yakima v. Esqueda* (1980), 612 P. 2d 821 (Wash. App.) and *In re P* (1977), 92 Misc. 2d 62 (N.Y. Fam. Ct.).

83 See the *Fraser Report*, *supra*, note 10, p. 362. The proposal was made by Professor Constance Backhouse and a group of law students from the University of Western Ontario. The response in the Report is that the "major criticism . . . is the possibility that it would be open to challenge under the equality provisions" of the *Charter*.

the eradication of gender as a factor in police and prosecutorial discretion.

These conclusions come not from an examination of the internal coherence and assumptions of prostitution law, but from an analysis that places prostitution in its wider social and economic context. The issue is whether gender-neutrality in prostitution law and enforcement is a flawed and limited goal within a context of the subordination of women.<sup>84</sup>

To limit our equality goal to gender-neutrality would be to aim for a symmetrical law. It is submitted that the issue of prostitution (as well as pornography) is an asymmetrical one. It is asymmetrical in various ways, since there are distortions of gender, sexuality, class and race.

It is further submitted that feminist analysis,<sup>85</sup> while acknowledging a major dilemma<sup>86</sup> in this area, can provide some helpful insights into alternative aspirations.

84 For a discussion of this concept, see the essay by Colleen Sheppard in this volume, *supra*, note 2.

85 See generally, N. Erbe, "Prostitutes: Victims of Men's Exploitation and Abuse" (1984), II *Law and Inequality* 609; K. Barry, "Female Sexual Slavery" (New York: Avon Books, 1981); B. Heye, "Prostitution: An Extreme Case of Sex Stratification", in *The Criminology of Deviant Women*, F. Adler and R. James Simon, eds. (Boston: Houghton Muffin, 1979).

86 A dilemma described by Edwin Schur in his book *Labeling Women Deviant*, *supra*, note 6 at pp. 171-172:

"On the one hand, the objectification and commoditization of women central to [prostitution] are anathema to most feminists. Kate Millett has suggested . . . that 'prostitution is somehow paradigmatic, somehow the very core of the female's social condition. . . . It is not sex the prostitute is really made to sell: it is degradation.' Yet women who become prostitutes, it is felt, are the victims and not the perpetrators of the practice. So while most feminists wish to strongly oppose prostitution, they would like to do so without implying disapproval of prostitutes. Several additional factors compound the dilemma. Some activist-prostitutes demand unqualified endorsement of their right to select this line of 'work' and they repudiate any feminist stance—including an excessive stress on their victimization—which they believe smacks of pity or condescension. At the same time, among nonprostitutes within the women's liberation movement, the degree of commitment to and solidarity with prostitutes as 'sisters' working together in a joint effort has been unclear. . . . Finally, feminist opponents of prostitution wish to avoid seeming in any way to favor, or to give support to those who favor, a general movement toward sexual repression. . . .

Confronting this still unresolved dilemma, contemporary feminists have usually made a two-fold recommendation with respect to prostitution. This means removing from the statute books the legal ban on prostitution (though penalties could still be kept for pimping and for abusive treatment of prostitutes). Such

First, feminist analysis brings to the foreground the differing economic contexts in which men and women live.<sup>87</sup> Also, it highlights the inadequate legal responses to women's poverty.<sup>88</sup> When the issue is broadened in this way, the inequality in punishing at least some women for trying to earn their living against a background of disproportionate poverty is evident. This point is heightened by the fact that the criminal law can realistically only be enforced against people without the resources to carry out their activities in secure privacy.<sup>89</sup>

Second, it is worth considering that the very legal construct of "prostitute" is discriminatory in itself. Women have little control over the legal or social meaning of prostitution. It is significant that feminist analysis helps us to refuse to isolate the prostitute.<sup>90</sup> If one sees prostitution as a form of sexual exploitation, it is certainly not a unique form.

Third, the law in its present formulation and probably in the limits of its effective enforcement, maintains the public/private divi-

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removal is to be distinguished from any form of 'legalization'—in which governmental licensing or regulation of prostitutes would imply state approval or at least acceptance of prostitution as a general practice. . . .

While decriminalization is seen as desirable in the short run, most of its feminist advocates stress that it should not however be viewed as a long-range 'solution'. They emphasize that the ultimate goal must be to do away with prostitution by eliminating the male demand for it." [References omitted.]

87 For a discussion of women's poverty, with references, see the essay by Susannah Worth Rowley in this volume, *supra*, note 2.

88 *Ibid.*

89 For a privacy analysis, see C.D. Perry, "Right of Privacy Challenges to Prostitution Statutes" (1980), 58 Wash. U.L.Q. 439. For that and other constitutional problems such as vagueness and overbreadth, see E.F. Murray, "Anti-prostitution Laws: New Conflicts in the Fight Against the World's Oldest Profession" (1979), 43 Albany L.R. 360.

90 See, e.g., S. de Beauvoir, *The Second Sex* (Bantam, 1961), pp. 523–541. It would seem that this was part of the reasoning behind the proposal of the Advisory Council on the Status of Women to criminalize all pressing and persistent solicitation. See the *Fraser Report*, *supra*, note 10, p. 516, and generally their report, *Prostitution in Canada* (1984). One can try to stop the isolation in various ways—by defining deviant acts in a manner that includes non-sexual behaviour, for instance assaultive, annoying or exploitative behaviour, and by seeing the similarities between prostitution and other sexual activities.

sion rejected by feminists.<sup>91</sup> The law focuses on the public manifestations of prostitution, while leaving private sexual transactions untouched. This very contrast should lead us to question the real interests that are being protected by the law. It may form part of the overall structure of state regulation in which sexual inequality is so pervasive as to be practically invisible.

If one sees inequality in the law as the legal expression of the subordination of women, formal equality or gender-neutrality obscures rather than eradicates that subordination. The feminist concern is with the subordination of women in general—subordination that takes somewhat different forms in different contexts but that, overall, has more in common than not. This is why I think that concern about prostitutes is not a paternalistic concern but a natural concern of women about the specific circumstances in which other women find themselves. At bottom, the question about equality to me is whether the prostitution of women is part of the overall subordination of women. If it is, the punishment of women, either under gender-neutral or gender-specific laws, compounds that oppression.<sup>92</sup>

This brings me to a basic concern that is aroused as much by the recommendations of the *Fraser Report* as by the new soliciting offences. Both envisage the punishment of women prostitutes for forms of soliciting behaviour.

Recommendation 58 of the *Fraser Report* contains the following proposed amendment to section 171 (1), disorderly conduct, *etc.*:

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91 See generally for the argument that the root of the inequality of the sexes lies in the dichotomy between the public and the private, K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985). See also C. MacKinnon, "The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion" (1983), 17 (No. 4) *Radical America* 23.

92 I do not mean to suggest that prostitutes should be immune from any criminal prosecution, but that punishment for activities associated with prostitution *per se* should be constitutionally suspect. This leaves the problematic question of whether offences not specifically to do with prostitution, such as causing a disturbance, could legitimately be used against prostitutes. On an abstract level, there seems to be nothing offensive about that. Women prostitutes should not be any more free to create public disturbances than any one else. However, within the context of our history of defining and enforcing the criminal law, the legitimate fear is that the use of such laws may be only a colourable device for doing indirectly what cannot be done directly. The problem remains that certain behaviours, such as accosting people in the street, are *not* the same when engaged in by a poor black woman as a wealthy white male. What this paper suggests is that less rather than more willingness to treat the former as deviant is consistent with equality.



Everyone who

- ...  
 (d) stands, stops, wanders about in or drives through a public place for purposes of offering to engage in prostitution or of employing the services of a prostitute or prostitutes and on more than one occasion,  
     (i) beckons to, stops or attempts to stop pedestrians or attempts to engage them in conversation,  
     (ii) stops or attempts to stop motor vehicles,  
     (iii) impedes the free flow of pedestrian or vehicular traffic, or of ingress or egress from premises adjacent to a public place  
 is guilty of an offence punishable on summary conviction subject to a maximum fine of \$1,000.00.<sup>93</sup>

This does not differ significantly from the new offences in section 195.1, discussed earlier.

The inevitable conclusion is that the inequality of women may be so embedded in our social and economic structures and in the formulation and enforcement of our laws, that at the present time there is no constitutionally appropriate way, consistent with equality, to punish women prostitutes.<sup>94</sup> The constitutional right to punish, since it involves a duty to punish equally, may have to await *de facto* equals to punish.

I realize that these are far from practical concerns, given the fact that we are still struggling with the double standard in judicial and enforcement decisions. In essence, the point is that the eradication of the double standard (should that happen) does not address the question of what standard to apply to the law in asking if it displays equal respect for women and men in the circumstances in which they have to live, earn their living and express their sexuality.

### 3. PORNOGRAPHY

The arrogant perceiver falsifies . . . but he also coerces the objects of his perception into satisfying the conditions his perception imposes. He tries to accomplish in a glance what the slave masters and batterers accomplish by extended use of physical force, and to a greater extent he succeeds. He manipulates the environment, perception, and judgment of her whom he per-

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<sup>93</sup> *Supra*, note 10 at pp. 538–539.

<sup>94</sup> This does not sound like a very firm or confident conclusion, but it best expresses why I have so much difficulty in deciding what is an ethically-defensible position on the law of prostitution. I recognise that it leads to the argument that customers should not be punished either as this is indirect harassment of prostitutes, but feel even more ambivalence about taking that next step.

ceives so that her recognized options are limited, and the course she chooses will be such as coheres with his purposes. The seer himself is an element of her environment. The structures of his perception are as solid a fact in her situation as are the structures of a chair which seats her too low or of gestures which threaten.<sup>95</sup>

This section of the paper should be placed within the broader context of the massive body of literature on the subject of pornography.<sup>96</sup> It is not an effort to add to or explore, except in a cursory fashion, the continuing feminist debate on this subject. Rather, it continues the challenge to gender-neutrality as a legislative and judicial goal for the achievement of equality by exposing the limitations of such an approach.

As a result, a number of initial assumptions are made. It is taken as a given that the inequality of women is ubiquitous in contemporary society and that the content of pornographic depictions operates to legitimate that subordination. Further, pornography is assumed to assist in the production of sexual inequality.<sup>97</sup> From this position, pornography poses a threat to the achievement of meaningful sexual

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95 M. Frye, *The Politics of Reality: Essays in Feminist Theory* (New York: Crossing Press, 1983), p. 67.

96 There are many excellent works on the subject of pornography. Without attempting an exhaustive list, see, for example, *Take Back the Night: Women on Pornography*, L. Lederer, ed. (New York: William Morrow and Company, Inc., 1980); A. Dworkin, *Pornography: Men Possessing Women* (New York: Perigee, 1981); *Women Against Censorship*, V. Burstyn, ed. (Vancouver: Douglas & McIntyre, 1985); C. MacKinnon, "Not a Moral Issue" (1985), 2 Yale Law & Policy Rev. 321; C. MacKinnon, "Pornography, Civil Rights, and Speech" (1985), 20 Harv. Cir. Rts.—Civ. Lib. Law Rev. 1; E. Hoffman, "Feminism, Pornography, and Law" (1985), 133 U. Penn. Law Rev. 497; K. Mahoney, "Obscenity, Morals and The Law: A Feminist Critique" (1985), 17 Ottawa Law Rev. 33; L. Clark, "Liberalism and Pornography", in *Pornography and Censorship*, D. Copp and S. Wendell, eds. (Buffalo: Prometheus Books, 1983).

97 I am not, here, attempting to argue a direct causal link between pornography and inequality, but rather that there is a dialectical relationship between images contained in pornographic depictions, and heterosexual expressions of sexuality as we know them. These representations of sexuality construct our understanding of what it is to be male and female, which plays out such that sexual characteristics become proxies for power and powerlessness. However, the empirical research on the effects of pornography is discussed by M. Gershel in "Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered" (1985), 11 William Mitchell Law Review 41, at notes 75-76, and by C. MacKinnon in "Not a Moral Issue," *supra*, note 96. See especially, *Pornography and Sexual Aggression*, N. Malamuth and E. Donnerstein, eds. (New York: Academic Press, 1984).

equality. It is within this context that it is necessary to examine the role the law plays in reinforcing the ideology of pornography, thereby affecting the concrete conditions of women's reality.<sup>98</sup>

A study of the history of the criminal law on obscenity, unlike that on prostitution, does not readily disclose different perceptions of the role of women and men. The *Code* provisions are completely gender-neutral. Both the legislation and its judicial interpretation have been framed without reference to gender. However, I want to argue that gender-neutrality as a legislative goal and constitutionally enforced norm serves only to obscure the fact that the current criminal law with respect to obscenity conceals gender inequality. In this respect, the law as presently framed cannot offset pornography's discriminatory effects.<sup>99</sup> Traditionally, feminists have long rejected the contention that legislation, at least outside the area of "real" biological differences between the sexes, i.e., pregnancy and reproduction, should in any way purport to deal with women differently from men.<sup>100</sup> Unfortunately, formal legal equality has rarely challenged underlying social inequities. What is required is a legal form that directly addresses these fundamental realities.

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98 My argument here is that the gendered representations of dominance and submission, power and powerlessness, contained in pornographic depictions, are but reflections on the level of sex of the more universal subordination of women. See also, C. MacKinnon, "Not a Moral Issue," *supra* note 96, who argues that pornography reflects the reality of women's experience within heterosexual sexual relations.

99 This view underlies Ordinance #3, City of Minneapolis (1984), drafted by C. MacKinnon and A. Dworkin. Section 139.10 of the Ordinance contains the following special findings in pornography:

"[P]ornography is central in creating and maintaining the civil inequality of the sexes. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, property rights, public accommodations and public services; create public harassment and private denigration; promote injury and degradation such as rape, battery and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the constitutions and laws of the United States and the State of Minnesota."

100 See, for example, W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts and Feminism" (1982), 7 Women's Rights Law Report 175.

Therefore, movement towards a contextualized "inequalities"<sup>101</sup> analysis would seem crucial if substantive sexual equality is to be achieved. Of necessity, such an approach would seek to address the social situation in which women find themselves *vis-a-vis* a particular problem. Whether legislation would infringe norms of sexual equality would thus no longer be assessed by insistence on similar treatment in all situations. On this basis, what follows is an examination of the existing criminal legislation and the judicial interpretation of it,<sup>102</sup> with particular attention to the recent moves towards a gender-sensitive treatment to the problems posed by pornography.

### (a) Obscenity Legislation

Reading the legislation discloses no story of women's sexuality. Legislative history, however, does have a tale to tell about sex. Prior to the enactment of the current *Code* provisions, the test for obscenity was that formulated in *R. v. Hicklin*:<sup>103</sup>

whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall.<sup>104</sup>

In 1953, the Parliament adopted a series of criminal provisions purporting to deal with sexual offences, offences against public morals,

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101 See C. MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979), p. 126. The thrust of such an approach is to begin with the recognition of male dominance and to "inquire whether a particular classification tends to facilitate and reinforce the subordination of women to men. Under this approach, sex discrimination is wrong not because it is irrational or arbitrary, but because it creates and maintains a sexual hierarchy that systematically disadvantages women." F. Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" (1984), 63 *Tex. L. Rev.* 387 at 397.

102 Given the absolute gender-neutrality of the obscenity laws, it is difficult to discern an equality issue with respect to the enforcement of the law. This is not to suggest that enforcement practices are unproblematic from an equality perspective, for failure to enforce the law is not "neutral" in its effect on women. The *Fraser Report* documents the extent of the pornography industry in Canada. Women's equality is affected by the law's failure to prevent the dissemination of pornographic materials.

103 *R. v. Hicklin* (1868), L.R. 3 Q.B. 360.

104 *Ibid.*, p. 371.

and disorderly conduct.<sup>105</sup> By virtue of section 159(1) of the *Code*, it is an offence to make, print, publish, distribute, or circulate "any obscene written matter, picture, model, phonograph record, or other thing whatsoever." Section 159(8) deems obscene, "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence. . . ." It was subsequently judicially established that section 159(8) is the sole test for obscenity and entirely replaces the former *Hicklin* test.<sup>106</sup> For material to be within the ambit of the legislation, the exploitation of sex must be a dominant characteristic of the work. Furthermore, such exploitation must be "undue".<sup>107</sup>

The legislation thus creates no distinctions on the basis of sex; on its face the law is entirely gender-neutral and, from a formalist perspective, does not raise a gender-equality issue. Judicial history clearly reveals that the law was designed to protect public morality by seeking to uphold standards of decency.<sup>108</sup> It seeks to suppress public expres-

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105 See Part IV of the *Code*, ss. 138–178. Section 159(8) was added in 1959. Note that although a number of these provisions have now been repealed (in particular, those dealing with sexual offences), the obscenity provisions were untouched. The obscenity provisions still appear under the sub-heading "Offences Tending to Corrupt Morals."

106 See *Brodie v. R.*, [1962] S.C.R. 681, 3 C.R. 120, 132 C.C.C. 161, 32 D.L.R. (2d) 507 (S.C.C.) and *R. v. Dechow*, [1978] 1 S.C.R. 951, 40 C.R.N.S. 129, 35 C.C.C. (2d) 22, 16 N.R. 204, 76 D.L.R. (3d) 1 (S.C.C.).

107 Quare whether such exploitation might ever be "due". Interestingly, by implication the *Code* legitimates sexual exploitation—a stance scarcely surprising in a patriarchal society. See Kate Millett, *Sexual Politics* (New York: Avon, 1971).

108 It is important to note that the "moral" discourse retained by the obscenity legislation obscures the fact that "good" and "evil" are but masks for a "morality" that ensures the stability of the family unit, thereby reinforcing male control over female sexuality, and hence patriarchal power. There seems little doubt that the discourse of morality here is used to promote patriarchal ideology. C. MacKinnon, in "Not a Moral Issue," *supra*, note 96, at p. 329, explains it in the following manner:

"Animated by morality from the male standpoint, in which violation—of women and rules—is eroticized, obscenity law can be seen to proceed according to the interests of male power, robed in gender-neutral good and evil. . . . [P]ublic is opposed to private, in parallel with ethics and morality, and factual is opposed to value determinations. These distinctions are gender-based: female is private, moral, valued, subjective; male is public, ethical, factual, objective. If such gendered concepts are constructs of the male experience, imposed from the male standpoint on society as a whole, liberal morality expresses male supremacist politics. That is, discourse conducted in terms of good and

sions of sexuality, in the name of preserving the moral fabric of the community.<sup>109</sup> Sex is equated with sin. The discourse of morality, aided by objective, gender-neutral language, obscures the fact that sex is gendered.<sup>110</sup>

Not only are the moral assumptions underlying the *Code* provisions problematic, but more significantly so is the notion of the "undue exploitation of sex." First, the requirement of the exploitation of sex means that certain kinds of representations that have no obvious sexual content will not be captured: e.g., the depiction of a woman's leg with spiked heel being put through a meat grinder. Moreover, it has been suggested that the concept of the "exploitation of sex" is inherently specious. It presents a fetishized view; namely that it is *sex* itself that can be exploited,<sup>111</sup> rather than its participants. This fetishization of sex necessarily leads to a further denial of contextualization. It fails to capture the reality that it is female sexuality that is commodified and vilified within pornography.

Neither the existing legislation nor any subsequent federal criminal law reform proposals seek to approach pornographic materials in a manner which recognizes the gender-specific nature of the harm pornography produces.<sup>112</sup> Adopting an "inequalities analysis" the ques-

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evil which does not expose the gendered foundations of these concepts proceeds oblivious to—and serves to disguise the presence and interest of—the position of power that underlies, and is furthered by, that discourse."

In any event, it would appear that women may be guided by a very different set of moral principles than men. See C. Gilligan, *In a Different Voice* (Boston: Harvard University Press, 1982).

109 See K. Mahoney and E. Hoffman, *supra*, note 96.

110 C. MacKinnon, in "Not a Moral Issue," *supra*, note 96 at p. 326, explains pornography in this way:

"With the rape and prostitution in which it participates, pornography institutionalizes the sexuality of male supremacy, which fuses the eroticization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be."

111 This idea was suggested to me by the co-author of this essay.

112 While the Fraser Committee recommended dropping the term obscenity in favor of provisions governing pornography, its recommendations are arguably less sensitive to gender inequality than those adopted by the British Columbia Court of Appeal in *Red Hot Video v. R.*, *infra*, note 134. See S. Noonan, "Pornography: Preferring The Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee" (1985), 45 C.R. (3d) 61. Bill C-114, *An Act to amend the Criminal Code and the Customs Tariff*, received first reading on June 10,

tion to be addressed is: Does the law's stance contribute to the continued subordination of women? If one accepts the premise that the law speaks as much through its silences as through its utterances,<sup>113</sup> the law's failure to regulate the existence of pornography is not a neutral position.

### (b) Judicial Interpretation

While the legislation itself is problematic, judicial interpretation has begun to express a much more desirable approach. Specifically, the courts are effecting a shift away from the concept of undue exploitation of sex towards an analysis informed by an understanding of sexual exploitation. This has been achieved by linking undue sexual exploitation with the feminist discourse of degradation and dehumanization. Moreover, a move towards a feminist methodology is occurring on two levels. The representations themselves are screened for the manner in which the participants are portrayed. As well, some recent judgments have acknowledged the threat to women's equality posed by certain types of depictions. Nonetheless, such a move has only transpired within the past four years. It may, therefore, be helpful to provide a brief summary of the prior judicial interpretation of the obscenity provisions.

The first leg of section 159(8) contains a prohibition against the undue exploitation of sex. The requirement of "undueness" has given rise to the so-called "community standards of tolerance test," under which the Court is required to assess whether a publication has exceeded the accepted standards of tolerance in the contemporary Canadian community.<sup>114</sup> The standard is a national one,<sup>115</sup> and this will vary

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1986 during the First Session of the 33rd Parliament. While the Bill utilized the concepts of pornography and degradation, it did not depart from the tradition of formal neutrality.

113 See K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985), p. 7, where it is argued that "the placement of an aspect of life inside or outside the law is a form of [state] regulation."

114 *Brodie v. R.*, *supra*, note 106, and *R. v. Dom. News & Gifts Ltd.*, [1964] S.C.R. 251, 42 C.R. 209, [1964] 3 C.C.C. 1 (S.C.C.). The standard would thus appear to be objective. The majority judgment of the Supreme Court of Canada in the recent case of *Towne Cinema Theatres v. R.*, [1985] 1 S.C.R. 494, [1985] 4 W.W.R. 1, 37 Alta. L.R. (2d) 289, 45 C.R. (3d) 1, 18 C.C.C. (3d) 193, 18 D.L.R. (4th) 1, 59 N.R. 101, 61 A.R. 35, affirmed that the issue here is one of tolerance not taste. "What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it:" *per* Dickson C.J.C. at p. 17 (C.R.).

115 See Freedman J.A.'s dissent in *R. v. Dom. News & Gifts Ltd.*, 40 C.R. 109, 42

according to "contemporary standards, reflecting the current level of candour, with regard to sexual matters, not the level of the past."<sup>116</sup> However, in light of the recent Supreme Court of Canada decision in *Towne Cinema Theatres Ltd. v. R.*,<sup>117</sup> it may well be that the community standards will no longer be the sole test applied in assessing whether sexual exploitation is "undue" for the purposes of section 159(8).

Of the seven-member panel who heard the *Towne Cinema* appeal, two concurred in the opinion of Dickson C.J.C. In the course of his decision, the Chief Justice enunciates three tests for establishing "undueness".<sup>118</sup> The first is that of "internal necessities",<sup>119</sup> which will prevent a finding of undue exploitation

if there is no more emphasis . . . than is required in the serious treatment of a theme . . . with honesty and uprightness. . . . [T]he serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work . . . must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation.<sup>120</sup>

The second test is that of community standards of tolerance, outlined above. Last, but very significantly, Dickson C.J.C. adopts a test that might be termed one of "degrading publications".<sup>121</sup> There is, however, no clear majority on the issue of whether the community standards of tolerance test is the only test of undueness.<sup>122</sup> Moreover, while it is now clear that the audience to whom material is shown is irrelevant in assessing the obscenity of depictions and that expert evidence need not be led to establish community standards, it remains unclear what evidence, if any, must be adduced.<sup>123</sup>

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W.W.R. 65, [1963] 2 C.C.C. 103 (Man. C.A.), approved on appeal to S.C.C., *supra*, note 114.

116 *Per* Dickson C.J.C. in *Towne Cinema Theatres Ltd. v. R.*, *supra*, note 114.

117 *Supra*, note 114.

118 *Ibid.*

119 *Ibid.*, p. 13 (C.R.).

120 *Ibid.*

121 For the phrase, see Beverly Baines' annotation to *Towne Cinemas Ltd. v. R.*, *supra*, note 114 at p. 4 (C.R.).

122 *Ibid.* The position adopted by Beetz, McIntyre, and Estey JJ. is unclear given that they simply state "the standard we seek is that of tolerance" (*Towne Cinemas*, *supra*, note 114 at p. 25 (C.R.)). On the other hand, Wilson J. appears to adopt the position that community standards must be used to assess undueness.

123 *Supra*, note 121 at p. 4 (C.R.).



In any event, given the prior dominance of the community standards test, not surprisingly, the obscenity provisions at least historically were less likely to countenance sexual depictions outside the sanctioned contexts of heterosexual, marital sex.<sup>124</sup> Moreover, in an age of increased public acceptance of displays of sexuality, pornographic depictions have become increasingly explicit, dehumanizing and violent.<sup>125</sup> The community standards of tolerance test has largely been applied in a liberal fashion so as to license the proliferation of pornographic materials. One need only take a trip to any newsstand to be aware that the liberal nature of judicial application of the obscenity provisions results in few pornographic materials being declared obscene. On occasion, the test has become circuitous, in that evidence of availability of the materials on the market has become indicative of tolerance.<sup>126</sup>

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124 See, e.g., *Popert v. R.* (1981), 19 C.R. (3d) 393, 58 C.C.C. (2d) 505 (Ont. C.A.), affirming (1980), 51 C.C.C. (2d) 485 (*sub nom. R. v. Pink Triangle Press* (Ont. Co. Ct.)).

125 It is clear that the proliferation of explicit genital shots, sado-masochistic materials, and materials containing sexual depictions of children are of comparatively recent origin. In my view, forms of patriarchal power are changing. As women gain increasing admission and acceptance within the public sphere, there is a corresponding increase in the need for men to retain control within the domestic sphere. Control is focussed on women's sexuality. This reinforces the argument of C. MacKinnon, *infra*, note 166, who argues that sexuality is the linchpin of women's oppression. Thus, the patriarchy attempts to maintain control by producing more pornographic materials to construct women's sexuality and, at the same time, increasingly to vilify women.

126 See, e.g., the remarks of Freedman J.A. in *Dom. News & Gifts Ltd. v. R.*, *supra*, note 115, at pp. 126-127 (C.R.):

"In this area of the law one must be especially vigilant against erecting personal tastes or prejudices into legal principles. Many persons quite evidently desire to read these magazines, even though I do not. I recognize, of course, that the mere numerical support which a publication is able to attract is not determinative of the issue whether it is obscene or not. Let a publication be sufficiently pornographic and it will be bound to appeal, in the hundreds of thousands, to the prurient, the lascivious, the ignorant, the simple, or even the merely curious. Admitting, therefore, that a large readership is not the test, I must yet add that it is not always an entirely irrelevant factor. For it may have to be taken into account when one seeks to ascertain or identify the standards of the community in these matters. Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered." [emphasis added]

See also K. Mahoney, *supra*, note 96 at pp. 63-70.

The second possibility, the so-called "sex-plus" provisions, have rarely been invoked.<sup>127</sup> In reality, the courts have focussed on the degree of graphicness of the representations. The exploitation of sex standard has, therefore, come to mean an "undue" degree of sexual explicitness.<sup>128</sup>

There is, however, recent evidence of a judicial awareness of the limitations of a sex-blind approach to the area and an appreciation of the merits of what might be termed a gender-sensitive approach in obscenity cases. Thus in *R. v. Wagner*,<sup>129</sup> Shannon J. of the Alberta Queen's Bench noted that there can be undue sexual exploitation where the participants are portrayed in a degrading or dehumanizing fashion.<sup>130</sup> The *Wagner* decision accepts the classification of pornographic materials into three types:<sup>131</sup>

- (a) sexually explicit with violence;
- (b) sexually explicit without violence, but dehumanizing or degrading; and
- (c) explicit erotica.<sup>132</sup>

Pornographic material classified under (a) or (b) is beyond the standards of tolerance in contemporary Canadian society. Mr. Justice Shannon's comments on the second category reflect an understanding of the harm women perceive in pornography:

In sexually explicit pornography that is free of violence, but is degrading or dehumanizing, men and women are often verbally abused and portrayed as having animal characteristics. Women, particularly, are deprived of unique

127 See K. Mahoney, *supra*, note 96 at pp. 57-63.

128 *Ibid.*

129 (1985), 43 C.R. (3d) 319, 36 Alta. L.R. (2d) 301 (Alta. Q.B.).

130 The *Wagner* decision is but one in a line of decisions in which judges have adopted the feminist discourse of degradation and dehumanization. In *R. v. Doug Rankine Co.* (1983), 36 C.R. (3d) 154 at 173, 9 C.C.C. (3d) 53 (Ont. Co. Ct.), Borins Co. Ct. J. held that the community standards of tolerance would be exceeded by "films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrades or dehumanizes the people upon whom they are performed." A similar approach was also adopted by Ferg J. in *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230, 29 Man. R. (2d) 110 (Man. Q.B.), and Harrison Prov. J. in *R. v. Chin*, unreported, February 22, 1983 (Ont. Prov. Ct.).

131 *R. v. Wagner*, *supra*, note 129 at pp. 331 (C.R.).

132 Mr. Justice Shannon defines sexually explicit erotica as portraying "positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality."

human character or identity and are depicted as sexual playthings, hysterically and instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts.<sup>133</sup>

A similar approach is adopted in *R. v. Red Hot Video Ltd.*,<sup>134</sup> where Nemetz C.J. of the British Columbia Court of Appeal notes that the "degrading vilification of women is unacceptable by any reasonable Canadian community standard."<sup>135</sup> Anderson J. in the same decision also is attentive to the fact that pornographic images "exalt the concept that in some perverted way domination of women by men is accepted in our society."<sup>136</sup> Moreover, he also notes that "[i]f true equality between male and female persons is to be achieved it would be quite wrong . . . to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material", given that "such material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women."<sup>137</sup> Significantly, in support of his contention that section 159(1) constitutes a "reasonable limit" under section 1 of the *Charter* on the section 2(b) *Charter* right to freedom of expression, Mr. Justice Anderson stresses that what constitutes a reasonable limit cannot be determined in isolation. Section 1 must be read in light of the *Charter* provisions in their entirety. In particular, Anderson J.A. focuses on section 28 of the *Charter*, which guarantees protection of *Charter* rights equally to male and female persons.<sup>138</sup> Thus, section 159(8) constitutes a reasonable limit on freedom of expression, and this is demonstrably justifiable in light of the need to ensure the equal worth and dignity of women. Presumably, this argument is now of even greater import given that section 15 of the *Charter* was not in force at the time the judgment in *Red Hot Video* was rendered.<sup>139</sup>

Less direct support for a gender-sensitive approach to obscenity cases can also be gleaned from the *Towne Cinema* decision. In his judg-

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133 *R. v. Wagner*, note 129 at p. 331 (C.R.).

134 (1985), 45 C.R. (3d) 36, 18 C.C.C. (3d) 1, 15 C.R.R. 206 (B.C.C.A.).

135 *Ibid.*, p. 43 (C.R.).

136 *Ibid.*, p. 59 (C.R.).

137 *Ibid.*

138 *Ibid.*, p. 66 (C.R.).

139 The judgment was handed down on March 18, 1985, almost a month before s. 15 of the *Charter* (the equality provisions) came into force on April 17, 1985.

ment, Chief Justice Dickson cites the *Rankine*,<sup>140</sup> *Wagner* and *Chin*<sup>141</sup> decisions with approval, finding that "publications which portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment may be 'undue' for the purpose of s. 159(8)."<sup>142</sup> Thus, notwithstanding that certain types of material fall within community standards of tolerance, they may nonetheless be "undue" within the meaning outlined above.<sup>143</sup> Unfortunately, it would appear that Dickson C.J.C. intended to limit the applicability of the degradation standard to one of three tests of undueness.<sup>144</sup> The judgments given by Beetz J. (Estey J. concurring) and McIntyre J. do not address this issue. Madam Justice Wilson's opinion has the merit of injecting this standard into all assessments of whether materials are obscene within the wording of section 159(8).<sup>145</sup> In the end result, while a majority of the Supreme Court of Canada endorses the adoption of feminist criteria, albeit articulated in different forms<sup>146</sup> and seemingly for disparate purposes, the exact circumstances in which they are to be applied await further judicial clarification.<sup>147</sup>

I have argued elsewhere<sup>148</sup> that this judicial trend is significant in

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140 *Supra*, note 130.

141 *Ibid.*

142 *Towne Cinema Theatres Ltd. v. R.*, *supra*, note 114 at p. 14 (C.R.).

143 *Ibid.*, p. 15 (C.R.).

144 As noted out by Beverly Baines in her annotation to the decision, *supra*, note 121, these comments are made in the context of establishing that community standards of tolerance are not the sole test of undueness. Dickson C.J.C.'s comments about degrading publications appears to form only a separate alternative category of "undue" sexual representations. From Dickson's judgment it is unclear which of the three tests of undueness is applicable in any given case.

145 *Towne Cinema*, *supra*, note 114 at p. 29 (C.R.). She states:

"It seems to me that the undue exploitation of sex at which s. 159(8) is aimed is the treatment of sex which in some fundamental way dehumanizes the persons portrayed and, as a consequence, the viewers themselves. There is nothing wrong in the treatment of sex per se but there may be something wrong in the manner of its treatment. It may be presented brutally, salaciously and in a degrading manner, and would thus be dehumanizing and intolerable not only to the individuals or groups who are victimized by it but to society at large."

146 It would seem that the concept with which the Chief Justice is principally concerned is that of degradation, while the paramount consideration for Madam Justice Wilson is that of dehumanization.

147 See B. Baines, *supra*, note 121 at p. 4.

148 See S. Noonan, Annotation to *R. v. Wagner* (1985), 43 C.R. (3d) 319; S. Noonan, "Preferring the Feminist Approach of the British Columbia Court of Appeal to That of the Fraser Committee" (1985), 45 C.R. (3d) 61.

that the cases adopt, in varying degrees, the feminist discourse of degradation, dehumanization, and objectification. Moreover, the courts, insofar as they move away from treating sexual explicitness as determining the issue of undue exploitation of sex, are adopting more of a feminist position in that sexual representations are contextualized. Such a shift more clearly aligns the existing obscenity provisions with a feminist position on pornography, and is arguably responsible to the nature of the harm threatened by pornographic depictions. Furthermore, there is some judicial support for permitting erotic materials to be disseminated without legal sanction, in particular, the *Wagner* decision.<sup>149</sup> Finally, by focussing on the implications of particular forms of representation for women's equality, a concept approaching sexual exploitation becomes the substantive test for obscenity.

### (c) Pornography and Equality

Insofar as legislation and the Courts fail to take the exploitation of women into account, the law legitimates the *status quo* and an atmosphere that is antithetical to the achievement of sexual equality. Thus, by failing to recognize the implications of pornography's message and to grapple with it, the law both reinforces and facilitates women's subordination. Neutrality and morality, objectivity and good and evil, have been the legal tools through which women's reality has been masked.<sup>150</sup>

What approach to pornography, then, might substantive equality, *i.e.*, equality of outcome, or condition, demand? What strategy ought to be adopted to combat the inequality that pornographic images per-

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149 *Supra*, note 129. This approach also seems to be favored by Madam Justice Wilson, who stated at p. 29 (C.R.) of her judgment in *Towne Cinema*, *supra*, note 114:

"[Sex] . . . may be presented in a way which harms no one, in that it depicts nothing more than non-violent sexual activity in a manner which neither degrades nor dehumanizes any particular individuals or groups. It is this line between the mere portrayal of human sexual acts and the dehumanization of people that must be reflected in the definition of 'undueness'."

However, whether there is such a category of "erotic" materials, which in fact "harm no one," has been recently questioned. See C. MacKinnon, "Not a Moral Issue," *supra*, note 96 and G. Finn, *Against Sexual Imagery: Alternative or Otherwise*, paper prepared for the Symposium on Images of Sexuality in art and the media presented by Gallery 101, Ottawa, March 13-16, 1985.

150 C. MacKinnon, *infra*, note 167.

petuate? In short, how is a balance between sexual freedom and social control to be struck?<sup>151</sup> The questions to be addressed are pressing ones, for the voices of women are beginning to be heard. A feminist analysis has created an impact in both adjudication and proposals for legislative reform.<sup>152</sup> The following discussion, rather than purporting to endorse either value, seeks to explore the relative strengths and limitations of two paradigms, namely sexual freedom and social control and to see how they would assist in the pursuit of substantive sexual equality.<sup>153</sup>

Embracing sexual freedom by adopting a position seeking minimal state regulation of sexual depictions would admit of the greatest potential to develop and explore a feminist erotica, or alternative images of women's sexuality that are potentially positive and liberative. By not invoking the protection of the law, there is less danger of the law being used to suppress women's views, or to prohibit representations of female sexuality that threaten the existing sexual order, such as lesbian sexual depictions.

Moreover, affirming sexual freedom allows clarity of political position.<sup>154</sup> Unlike the New Right, the feminist movement is not seeking to delegitimize sexual desire *per se*.<sup>155</sup> Often that movement, in taking an antipornography stand, has found itself aligned with members of the moral majority, or other groups who seek to privatize sex.<sup>156</sup> Vigilance is necessary to ensure that sex is not simply relegated to the private realm, in which women's oppression has long taken place in silence and isolation. The feminist attack on pornography is but part of a larger political campaign against current constructions of sexuality, with the concomitant distributions of power and the implications those constructions have for women's subordination.

But, would the development of a feminist erotica promote the

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151 See F. Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" (1984), 63 Tex. L. Rev. 387; Zillah Eisenstein, *Feminism and Sexual Equality* (N.Y.: Monthly Review Press, 1984).

152 The recent *Fraser Report* expressly canvassed and included feminist perspectives on pornography. Moreover, it acknowledged that the availability of pornographic materials undermines women's struggle for sexual equality. Unfortunately, however, within the typical liberal paradigm, while it sought to hear, and not suppress, the feminist viewpoint, these perspectives seem to have had little impact on the ultimate recommendation for reform of the criminal law.

153 Z. Eisenstein, *supra*, note 151.

154 *Ibid.*, pp. 246-254.

155 F. Olsen, *supra*, note 151 at p. 431.

156 See Z. Eisenstein, *supra*, note 151 at p. 251.

achievement of substantive sexual equality? Would it help to equalize the social conditions of women and men? If we accept that the ideology of pornography affects the social position of women, then logically, if there is a distinction between pornography and erotica, it seems tenable to suggest that the development of sexual images produced by women for women might also have an effect. This is not to suggest that, given the current control of the mass media and the fact that patriarchal sexual representations serve to reinforce *existing* male hegemony, recognition of this idea corresponds to a belief in the liberal "marketplace of ideas."<sup>157</sup> Rather, in principle it might be argued that permitting women to have a voice in the meaning of what it is to be female would seem at least to be a step towards empowering women.<sup>158</sup>

However, we should at least ask ourselves MacKinnon's question: Given the present circumstances of gender inequality "what is eroticism as distinct from the subordination of women?"<sup>159</sup> Has eroticism become inextricably fused with dominance and submission and with expressions of power and powerlessness such that representations of heterosexual intercourse are by definition depictions of unconsensual sex? Has our ability to imagine a different world been so constrained by the structures<sup>160</sup> of inequality thrust upon us and legitimated by every level of the superstructure, (the oppression, of course, is at least equally present within the domestic sphere), that we cannot yet dream except in specious ideologies? Last, we should carefully examine the question of whether sexual representations may by definition reproduce a male epistemology, and hence reinforce patriarchal power.<sup>161</sup> Even accepting the dangers implied by these questions, however, few would advocate the elimination of all forms of sexual depiction. Indeed, even if such a move were proposed, some form of sexuality would remain.

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157 This is a notion that truth and good will prevail if only we can permit men to see it. Moreover, as a strategy for the achievement of substantive sexual equality, merely promoting sexual freedom seems, at best, naive. We cannot ignore the lessons of history, which tell us that in reality sexual freedom turns out to be freedom for men to exploit women.

158 See, for example, Z. Eisenstein, *supra*, note 151, who argues that sexual equality requires this sexual freedom for women.

159 "Not a Moral Issue," *supra*, note 96 at p. 343.

160 *Ibid.*

161 See G. Finn, *supra*, note 149.

Given that a critique of sexuality may be central to feminist theory,<sup>162</sup> and correspondingly the deconstruction of it a fundamental political strategy, it is important that women reconstruct concepts of sexuality.<sup>163</sup> Therefore, it would seem that despite the differences in strategy, a minimalist resolution of these conflicting positions on pornography can be forged. This is that the law can assist women by censoring<sup>164</sup> images that legitimate their subordination.

By electing for some degree of social control, protection may be gained from images of women that reinforce prevailing patriarchal ideology.<sup>165</sup> However, we must ensure that any rules formulated will be efficacious in redressing pornography's discriminatory effects. This must be designed to be sensitive to the images of women that pornography reproduces.<sup>166</sup> Moreover, the older judicial discourse of morality must be rejected as it seeks to delegitimize sexual desire without regard to whether particular types of sexual depiction contribute to the continued subordination of women.

Beyond that, the commitment to equality requires a consideration of what form of legal redress will best empower women, irrespective of their economic position, to curtail effectively the production and distribution of pornographic material. Is the civil law, or the criminal law, or some combination of both the best vehicle for legal change?

Finally, social control must be embraced cautiously given that the legal system has often been complicitous in women's subordination and given that laws are still applied largely by men. It would seem that the risk that laws will only serve to further the needs of the patriarchy may best be offset by an attempt to formulate laws that adopt both a feminist discourse and a feminist methodology.<sup>167</sup> Even if this

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162 See C. MacKinnon, *infra*, note 167.

163 See F. Olsen, *supra*, note 151, and F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1982-83), 96 Harv. L.R. 1497.

164 C. Sumner, "Rethinking Deviance: Toward a Sociology of Censures" in *Research in the Sociology of Law and Deviance*, S. Spitzer, ed., Vol. 5, (Connecticut: JAI Press, 1984).

165 See Z. Eisenstein, *supra*, note 151.

166 See C. MacKinnon, "Not a Moral Issue," *supra*, note 96 at p. 335.

167 See C. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983), 8 Signs 635; D. Polan, "Toward a Theory of Law and Patriarchy", in *The Politics of Law*, D. Kairys, ed., (New York: Pantheon Books, 1982); J. Rifkin, "Toward a Theory of Law and Patriarchy" (1980), 3 Harv. Women's L.J. 83.



were to be achieved legislatively, it furnishes no guarantee that in its application the law will not be twisted and used against women. Moreover, at the risk of being trite, legal reform is in and of itself no panacea for ubiquitous social inequality.

My own vision for a new world free from sexual inequality would demand both sexual freedom and social control for its achievement. Challenging prevailing images by fostering new conceptions of sexuality that celebrate desire may pave the way for alternative constructions of gender. At the very least, such a move would serve to empower women by presenting them with a choice of ways in which to conceive of, and thereby express, explore and evolve their own sexuality. Moreover, the censure of certain sexual images that facilitate the continued subordination of women may liberate popular imaginations from the current structures of male thought and power. In contrast, gender-neutrality denies women's reality and, if adopted in formulating laws to redress pornography's discriminatory effect, will be futile in aiding our quest for true sexual equality.

#### 4. CONCLUSION

The implications of the foregoing analysis of the criminal laws on prostitution and pornography suggest that rejection of any *a priori* attempt to push either gender-neutrality or gender-specificity as a legislative or judicial goal is perhaps the best strategy for achieving sexual equality. Neither tool for legal reform as an abstraction will serve to promote women's equality in all contexts.

An attempt has been made to demonstrate that gender-specific prostitution laws have had harmful consequences for women engaged in that work. Moreover, it has been suggested that gender-neutral legislation may simply drive discrimination underground.

More significantly, however, gender-neutrality may also serve to obscure the true social problem with which legislators and judges ought to be grappling, as seems to have been the case with our laws on obscenity. An approach that recognizes the effect of pornography in producing and promoting women's equality would be preferable.

In the result then, this paper is a "plea for ambivalence"<sup>168</sup> in con-

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168 As suggested by Professor Kathleen Lahey at the conference entitled *Politics of Pornography: Politics of Prostitution*, sponsored by The Ontario Public Interest Research Group, Toronto, November, 1985.

ceiving of equality. Rather than clinging either to gender-specificity or gender-neutrality as rigid goals for legal reform, women's actual inequality must be acknowledged. In this context, legislators and adjudicators should ask whether a given law adds to the overall subordination of women when assessing whether or not it infringes section 15 of the *Charter*. If section 15 is not to become a hollow victory for Canadian women, we must reject blind adherence to the principle of formal equality in favour of a flexible, contextualized approach.

